

STATEMENT OF THE CASE

Troy Monroe appeals his convictions for Child Molesting, as Class A felonies, following a jury trial. He presents six issues for our review, which we consolidate and restate as:

1. Whether his trial counsel performed ineffectively by not objecting to the admission of certain evidence.
2. Whether the trial court committed fundamental error when it admitted the challenged evidence.
3. Whether the trial court improperly sentenced Monroe to reduced and consecutive sentences.
4. Whether Monroe's sentence is inappropriate in light of the nature of his offenses and his character.

We affirm.

FACTS AND PROCEDURAL HISTORY

For about two years ending in August 2004, A.R. lived with her mother, sister, brothers, and her mother's boyfriend, forty-one-year-old Monroe. Monroe is the biological father of A.R.'s youngest brother. A.R.'s mother worked at a hospital on a night shift and she left for work before A.R. came home from school. Monroe was in charge of the children when A.R.'s mother was at work. He made them do homework, prepared their meals, and sent them to bed around 8:00 p.m.

On numerous occasions during those two years, Monroe came to A.R.'s room after she was asleep, picked her up, and carried her to his bedroom. He would then take off her pajamas and her underpants and put his penis in A.R.'s "bottom" and "go up and down." Transcript at 152. He also would say to A.R., "Do me," and then put his penis in

A.R.'s mouth. Transcript at 246. These events happened more than ten times. Sometimes, Monroe would put his finger in A.R.'s vagina.

On August 20, 2004, when she was nine years old, A.R. was at her best friend's house and told her best friend and two other girls that Monroe was touching her. The girls told A.R. to tell her father, Bennett Ramage. A.R. called Ramage on the phone and told him that Monroe was touching her. A.R. spent the night at her best friend's house, and on the following day, Ramage took A.R. to an emergency room. The hospital employees reported the alleged abuse to the police.

On August 26, A.R.'s parents took her for an examination by Dr. Edwin A. Udani. Based on A.R.'s statements, Dr. Udani recorded his "[h]igh suspicion of sexual abuse" in A.R.'s medical records. State's Ex. 4. Dr. Udani also noted in his report that A.R. told him Monroe had sexual intercourse with her. That same day, A.R. also gave a recorded statement to a forensic interviewer, Kris Pate, at Dunebrook, a family support and child advocacy center. A.R. told Pate that Monroe put his penis in her bottom and her mouth but not in her vagina.

On October 8, the State charged Monroe with ten counts of Child Molesting, as Class A felonies. Counts 1-4 and 9 charged that Monroe engaged in sexual intercourse with A.R., while Counts 5-8 and 10 charged Monroe with performing deviate sexual conduct with A.R. On November 30, Monroe deposed A.R. A.R. testified that Monroe touched her front private with his hand and put his "weinie" [sic] in her front private, her mouth, and her bottom. Defendant's Ex. A at 15. A.R. said Monroe put his wienie in her

front private more than twice, and he put his wienie in her bottom and her mouth more than ten times.

Immediately prior to trial on August 15, 2006, the State informed Monroe and the trial court that it intended to introduce A.R.'s videotaped interview with Pate. Monroe responded that he had no objection so long as the transcript of A.R.'s deposition would also be admitted. In Monroe's opening argument, his counsel told the jury, "I believe that you are going to see major inconsistencies." Transcript at 102. During the trial, A.R. testified that Monroe put his penis in her bottom and her mouth but not in her vagina. During cross-examination, Monroe impeached A.R. with inconsistencies between her statements and testimony.

Out of the jury's presence, the parties discussed admitting A.R.'s medical records from Dr. Udani's examination. Monroe objected to the admission of Dr. Udani's opinion within the medical records because Dr. Udani was not subject to cross-examination. Monroe did not object to "his procedure that he performed and the history that he obtained from the patient." *Id.* at 269. The trial court stated it would admit the medical records under Indiana Evidence Rule 803 as a "special exception for medical records, including the diagnosis and opinions of doctors." *Id.* at 270. During trial and when the State moved for admission of the medical records, Monroe reiterated his earlier objection, which the court overruled.

During Monroe's case-in-chief, trial counsel presented the transcript of A.R.'s deposition. He also presented testimony from Monroe's father, Carl Klahn, that A.R. injured herself at school "between her legs." Transcript at 298. During closing

argument, Monroe's counsel highlighted the inconsistencies between A.R.'s various statements and her testimony. The jury acquitted Monroe on all the charges alleging that he had sexual intercourse with A.R. (Counts 1-4 and 9), but the jury convicted Monroe on the charges that he performed sexual deviate conduct with A.R. (Counts 5-8 and 10).

On September 5, the trial court sentenced Monroe. The court found the following aggravators to justify the imposition of consecutive sentences: 1) the nature and circumstances of Monroe's crimes, namely, the repetition of the sexual deviate conduct; 2) his criminal history; and 3) his violation of a position of trust. The court sentenced Monroe "consecutively on all five charges to twenty-two years in the Indiana Department of Correction, with two years suspended on each count, so that you will be in prison for a total of one hundred and ten years, with ten suspended, for a total of one hundred years incarceration." Sentencing Transcript at 12. This appeal ensued.

DISCUSSION AND DECISION

Issue One: Ineffective Assistance of Counsel

Monroe claims that his counsel rendered ineffective assistance when he failed to properly object to the admission of A.R.'s videotaped statement and medical records. The well known two-pronged standard for ineffective assistance comes from Strickland v. Washington, 466 U.S. 668, 698, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984). To succeed on such a claim, Monroe must demonstrate both that counsel performed deficiently and that prejudice resulted. Jones v. State, 847 N.E.2d 190, 195 (Ind. Ct. App. 2006). To establish deficient performance, Monroe must show that counsel's representation fell below an objective standard of reasonableness. Rose v. State, 846 N.E.2d 363, 366 (Ind.

Ct. App. 2006) (citing Strickland, 466 U.S. at 688, 104 S. Ct. 2052). In order to establish the second prong of prejudice, Monroe must show “a reasonable probability” that the result of his trial would have been different but for counsel’s deficient performance. Id.

“Few points of law are as clearly established as the principle that ‘[t]actical or strategic decisions will not support a claim of ineffective assistance.’” Hollins v. State, 790 N.E.2d 100, 109 (Ind. Ct. App. 2003) (quoting Sparks v. State, 499 N.E.2d 738, 739 (Ind. 1986)). We give great deference to counsel’s discretion to choose strategy and tactics, and even the best defense attorneys may disagree on the ideal strategy or most effective approach in any given case. Id. (citing Strickland, 466 U.S. at 689-90, 104 S. Ct. 2052).

Monroe’s trial counsel based his theory of defense—that A.R. was lying and no abuse ever happened—on the “major inconsistencies” in A.R.’s various statements. Transcript at 102, 327. Before the trial started, counsel expressly premised his lack of objection to the videotaped statement on the State’s agreement to admit the transcript of A.R.’s deposition. And regarding the admission of A.R.’s medical records, counsel did object to the portion of the records that contained Dr. Udani’s opinion.¹ However, counsel then stated, “I have no objection to his procedure that he performed and the history that he obtained from the patient” Transcript at 269. The reasonable inference to be drawn from counsel’s comments is that counsel would have had no objection to the medical records at all had Dr. Udani’s opinion been redacted. Clearly, trial counsel refrained from objecting to the videotaped statement and the non-opinion

¹ Monroe incorrectly states that trial counsel objected to the medical records “on the grounds that they contained hearsay.” Appellant’s Brief at 11. He does not discuss trial counsel’s further statements regarding the admissibility of the rest of the records.

portion of the medical records to support his specific strategy of emphasizing A.R.'s inconsistent statements.

Further, this strategy was reasonable given his familiarity with all of A.R.'s statements, including her deposition testimony obtained by a prior counsel, as evidenced in his cross-examination of A.R. And counsel did, in fact, specifically object to Dr. Udani's opinion within the medical records. Again, trial counsel is afforded great discretion in selecting strategy and tactics, and we presume "that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Rose, 846 N.E.2d at 366 (citing Strickland, 466 U.S. at 688, 104 S. Ct. 2052). Because counsel consciously refrained from objecting to the videotaped statement and the medical records in a manner consistent with a reasonable trial strategy, Monroe has not shown that counsel performed deficiently.

The two prongs of the Strickland test are independent inquiries and, thus, if the defendant makes an insufficient showing on one, we need not address the other. Wieland v. State, 848 N.E.2d 679, 681 (Ind. Ct. App. 2006) (citing Strickland, 466 U.S. at 697, 104 S. Ct. 2052). Thus, we will not consider whether Monroe can show prejudice under Strickland.

Issue Two: Admission of Evidence

Monroe did not properly preserve all the claimed errors regarding the admission of the videotaped statement and medical records with a contemporaneous objection. Any unpreserved error is waived and need not be addressed by the reviewing court unless the error is "fundamental." Oldham v. State, 779 N.E.2d 1162, 1170 (Ind. Ct. App. 2002)

(citing Carter v. State, 754 N.E.2d 877, 881 (Ind. 2001), reh'g denied), trans. denied. Hence, to secure our review, Monroe also argues that the trial court committed fundamental error by admitting the videotaped statement and the medical records.

Our Supreme Court defines and discusses fundamental error, as follows:

A fundamental error is a substantial, blatant violation of basic principles of due process rendering the trial unfair to the defendant. It applies only when the actual or potential harm cannot be denied. The error must be so prejudicial to the rights of a defendant as to make a fair trial impossible. An appellate court receiving contentions of fundamental error need only expound upon those it thinks warrant relief. It is otherwise adequate to note that the claim has not been preserved.

Id. (quoting Carter, 754 N.E.2d at 881 (quotations and citations omitted)). We also assess the probable impact of the evidence on the jury to determine whether error in the introduction of evidence affected an appellant's substantial rights. Manuel v. State, 793 N.E.2d 1215, 1219 (Ind. Ct. App. 2003).

We conclude that this evidence did not impact Monroe's substantial rights or improperly affect the jury. First, A.R.'s trial testimony established all the elements of Monroe's crimes, and he does not claim otherwise. This evidence alone is sufficient to support Monroe's convictions. See McCoy v. State, 856 N.E.2d 1259, 1262 (Ind. Ct. App. 2006) ("[A] conviction for child molesting may rest solely upon the uncorroborated testimony of the victim.").

Second, the results of Monroe's trial prove that the jury was not negatively impacted by the admission of this evidence. Monroe was originally charged with ten counts of child molesting, all as Class A felonies. Five of those charges, Counts 1-4 and 9, alleged that Monroe engaged in sexual intercourse with A.R., while the others, Counts

5-8 and 10, alleged that Monroe performed deviate sexual conduct with A.R. The State's evidence included three separate statements from A.R.: 1) her trial testimony; 2) the videotaped statement; and 3) her statements made during Dr. Udani's exam contained in the medical records. Monroe presented a fourth statement from A.R., her deposition testimony, during his case-in-chief.

During her trial testimony and her videotaped statement A.R. denied that Monroe engaged in sexual intercourse with her, while in the medical records and the deposition, A.R. said that Monroe did have sexual intercourse with her. The jury returned guilty verdicts in accordance with A.R.'s trial testimony, child molesting by sexual deviate conduct, and it returned not guilty verdicts for the crimes that her trial testimony did not prove, namely, child molesting by sexual intercourse.

To the extent that A.R.'s statements within the videotaped statement and medical records coincide with A.R.'s trial testimony, the challenged statements are cumulative. Thus, any error caused by the admission of this cumulative evidence is harmless. Muncy v. State, 834 N.E.2d 215, 217 (Ind. Ct. App. 2005). Therefore, such error was not fundamental because it cannot deny Monroe either due process or a fair trial. Carter, 754 N.E.2d at 881.

Issue Three: Imposition of Reduced Consecutive Sentences

Monroe also challenges his sentence. Specifically, Monroe contends that the imposition of consecutive sentences "is at odds with the trial courts [sic] apparent finding that the mitigating circumstances outweighed the aggravating factors as evidenced by" his reduced sentences. Appellant's Brief at 14. We consider the court's decision to

impose reduced sentences separately from its order that Monroe's sentences be served consecutively.

Reduced Sentences

Because Monroe committed his crimes before the legislature amended the sentencing statutes in April 2005, he should have been sentenced under the old presumptive sentencing scheme. See Weaver v. State, 845 N.E.2d 1066, 1072 (Ind. Ct. App. 2006). Under that sentencing scheme, when a trial court deviates from the statutorily prescribed presumptive sentence, it must: 1) identify all of the significant mitigators and aggravators; 2) explain each circumstance is mitigating or aggravating; and 3) articulate the evaluation and balancing of these circumstances to determine whether an enhanced or reduced sentence is appropriate. Kinkead v. State, 791 N.E.2d 243, 247 (Ind. Ct. App. 2003), trans. denied.

The presumptive sentence for each of Monroe's Class A felonies was thirty years. See Ind. Code § 35-50-1-2 (West 2004). The court could not add more than twenty years for aggravating circumstances, and the court could not reduce the presumptive sentence by more than ten years. Id. Further, because Monroe was convicted for child molesting, as a Class A felony, the court could only "suspend that part of the sentence that is in excess of the minimum sentence" Ind. Code § 35-50-2-2(b)(4)(H).

Monroe offered two potential mitigators to the trial court: his claim of innocence, which he argued was supported by the jury's acquittal on some charges; and the fact that his criminal history contained no prior felony convictions. The court rejected the former and, regarding the latter, found Monroe's criminal history to be "not substantial."

Sentencing Transcript at 10. The trial court's written sentencing statement reads, in pertinent part, as follows:

The Court further finds that the Defendant should be sentenced to the Indiana Department of Correction for a period of 22 years as to each count. Further, that said[,] sentences should be served consecutively because of the Defendant's prior criminal record, his violation of position of trust, and the nature and circumstances of the crimes.

Appellant's Appendix at 27-28. In the court's oral sentencing statement, it acknowledged confusion about which version of the sentencing scheme should be used, but the court determined that there were no valid aggravating circumstances to support an enhanced sentence under Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L.Ed.2d 403 (2004). The court also correctly noted that it could not sentence Monroe to less than twenty years and that it must find aggravating factors to justify consecutive sentences.

Our reading of the record reveals that the court found no mitigating circumstances to justify deviating from the presumptive sentence. Indeed, the only possible error related to Monroe's sentence is the court's failure to articulate its rationale for deviating from the presumptive and imposing a reduced sentence. But the court could have imposed the presumptive sentence—thirty years instead of twenty-two—without making any statement. See Childress v. State, 848 N.E.2d 1073, 1801 (Ind. 2006). Thus, Monroe was not prejudiced by the court's failure to articulate its rationale for imposing a reduced sentence, and we affirm the sentence because any error was harmless. See Banks v. State, 841 N.E.2d 654, 658 (Ind. Ct. App. 2006) (harmless error where trial court failed to articulate mitigating circumstance that would not have affected sentence imposed), trans. denied.

Consecutive Sentences

Initially, the imposition of consecutive sentences does not raise a Blakely issue:

The trial court's sentencing of Smylie to consecutive terms after finding an aggravating circumstance did not increase the sentence above the statutory maximum for each offense. There is no constitutional problem with consecutive sentencing so long as the trial court does not exceed the combined statutory maximums.

Plummer v. State, 851 N.E.2d 387, 390 (Ind. Ct. App. 2006) (quoting Smylie v. State, 823 N.E.2d 679, 686 (Ind. 2005)).

The decision to impose consecutive sentences is generally within the trial court's discretion. Shafer v. State, 856 N.E.2d 752, 756 (Ind. Ct. App. 2006). A trial court may not, however, impose consecutive sentences unless it finds at least one aggravating circumstance. Plummer, 851 N.E.2d at 390. "[T]he only possible question regarding the propriety of the consecutive sentences is whether or not there were sufficient aggravating circumstances to support the decision to run the sentences consecutively." Id. (quoting Bryant v. State, 841 N.E.2d 1154, 1157 (Ind. 2006)). When a trial court imposes consecutive sentences not statutorily required, it must explain its reasons for selecting the sentence imposed, including: 1) the identification of all significant aggravating and mitigating circumstances; 2) the specific facts and reasons that lead the court to find the existence of each such circumstance; and 3) an articulation demonstrating the balance of mitigating and aggravating circumstances to determine the sentence. Id.

Here, the trial court properly supported its imposition of consecutive sentences. The court found that it could not impose an enhanced sentence because the jury did not find any Blakely aggravators and also discussed the need to "find some sort of

aggravating factors that outweighs [sic] the mitigating factors” to support consecutive sentences. Sentencing Transcript at 10. The court then identified three aggravators: 1) the nature and circumstances of his crimes, namely, the repetition of the sexual deviate conduct; 2) Monroe’s criminal history; and 3) his violation of a position of trust. It then found “substantial aggravating factors for purposes of concurrent or consecutive [sic].” Id. at 11.

Monroe cites White v. State, 847 N.E.2d 1043 (Ind. Ct. App. 2006), in support of his argument that a trial court may not order presumptive or less-than-presumptive sentences to run consecutively. That case, however, does not help his argument. Indeed, in White, we remanded the case only because the court had not supported imposition of consecutive sentences by identifying an aggravating circumstance. Id. at 1047 (“We note the sentence imposed on remand could be the same sentence we reverse herein, if the court supports its sentence with appropriate findings.”). But Monroe does not challenge the validity of the court’s stated aggravators. Nor does he claim that the court ignored valid mitigating circumstances. Rather, Monroe claims that the trial court “did not follow these three directives[, i.e., the required three-step procedure,] when sentencing Monroe.” Appellant’s Reply Brief at 7. We cannot agree.

The trial court’s statements show that it considered Monroe’s proffered mitigators and identified three aggravating circumstances to support imposition of consecutive sentences. Because the court found no mitigators, we must logically conclude that the identified aggravators outweighed the non-existent mitigators. See Gleaves v. State, 859 N.E.2d 766, 771 (Ind. Ct. App. 2007). The record indicates that the court engaged in an

evaluative process and deemed consecutive sentences appropriate. Plummer, 851 N.E.2d at 392. Thus, the trial court did not abuse its discretion when it sentenced Monroe to serve his sentences consecutively.

Issue Four: Whether Monroe's Sentence is Inappropriate

Finally, Monroe argues that, although his crimes are serious, his sentence is inappropriate because he never used “bondage or violence” against his victim and his criminal history included only misdemeanors. Appellant’s Brief at 15. Under Indiana Appellate Rule 7(B) we may revise a sentence authorized by statute if, after considering the trial court’s decision, we find that the sentence imposed is inappropriate in light of the nature of the offense and the character of the offender. Ind. Appellate Rule 7(B). In this review, however, we recognize the special expertise of the trial court in making sentencing decisions and do not merely substitute our opinion for that of the trial court. Davis v. State, 851 N.E.2d 1264, 1267 (Ind. Ct. App. 2006).

The trial court considered the nature of Monroe’s offenses, the multiple molestations over a period of at least two years, and found that to be an aggravating circumstance. The court also specifically noted that although Monroe had no felony convictions, he did have a criminal history and found that to be an aggravator “although that’s not substantial” Sentencing Transcript at 10. Finally, the court found that Monroe violated a position of trust when he committed these crimes against his girlfriend’s daughter. As noted above, Monroe does not contest the court’s articulated aggravating circumstances. Using the trial court’s comments as our guideline, we cannot say that Monroe’s aggregate 110-year sentence for five separate sexual crimes against a

child is inappropriate in light of the nature of his offenses and what they reveal about his character.

Affirmed.

RILEY, J., and BARNES, J., concur.